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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 678.

NAFI CORPORATION,

Petitioner,

vs.

AMERICAN ARBITRATION ASSOCIATION,

and

TEXTILE WORKERS UNION OF AMERICA, LOCAL UNION NUMBER 981,

Respondents.

BRIEF OF RESPONDENT TEXTILE WORKERS UNION OF AMERICA, LOCAL UNION NO. 981, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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I. COUNTERSTATEMENT OF QUESTION BEFORE THE COURT.

In excepting wages from arbitration, does the labor-management contract before the Court exclude from arbitration a claim for vacation pay either (1) expressly or (2) by evidence of such intent sufficiently forceful to require a court to so hold rather than permitting an arbiter to determine whether the claim is arbitrable?

The courts below have answered NO.

This respondent would answer NO.

II. STATEMENT OF THE CASE.

The Petitioner operated in Findlay, Ohio a manufacturing plant in an industry affecting commerce. The Respondent, the Textile Workers Union of America, Local No. 981, represented its employees, pursuant to a certification by the National Labor Relations Board.

In 1958 the employer closed its plant and the union requested accrued vacation pay for certain of the former employees. Negotiations were unsuccessful and in October, 1959 the union referred the matter to arbitration by the Respondent American Arbitration Association, and after further negotiations notified it that the arbitration should proceed.

In January, 1960 the employer filed suit in the Common Pleas Court of Hancock County, Ohio, seeking a declaratory judgment that the union's claim for vacation pay was not subject to arbitration because the collective bargaining agreement between the employer and the union, Article V, Section 3, says wages are not arbitrable.

The employer argues that because vacation pay is regarded as income, like wages, for purposes of income tax, social security, unemployment compensation, and workmen's compensation the exclusion of wages from the arbitration procedure bars arbitration of the union's grievance with respect to vacation pay.

It is the union's position that vacation pay is treated separately in this contract from wages and for this purpose is not encompassed by the word "wages"; that the contract does not exclude vacation pay from arbitration either expressly or by evidence of such intent sufficiently forceful to require a court to so hold; and that the issue of arbitrability is one that the contract and therefore federal law require the parties to submit to an arbitrator. The contract provides in part as follows:

ARTICLE V

GRIEVANCES

Section 1. The Company shall meet with the Representatives of the Union, at time mutually convenient to both Parties, for the prompt settlement of any dispute or grievance which may arise between the Employees and the Company. * * *

Section 2 Should any grievance arise, the following steps shall be taken for settlement of same. * * *

Section 3. Any dispute or grievance, excepting wages, which cannot be resolved in the foregoing manner may be submitted to arbitration by either Party, by giving written notice to the other Party within ten (10) days after final discussions are held thereon. In any matter filed for Arbitration hereunder, a request shall be made of the American Arbitration Association to name the Arbitrator, in accordance with the rules of voluntary arbitration governing such Association. * * *

Section 6. The Arbitrator may not add to, subtract from, or opinionate on, the Agreement or any part of it. The decision of the Arbitrator shall be final and binding on both Parties.

Section 7. This grievance procedure shall be the exclusive method for the handling of grievances. * * *

ARTICLE X

NON-LIABILITY

Section 1. It is hereby agreed by the Union and the Employer that since this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences, disagreements or controversies of any nature or character and there should be no resort to strikes (which include work stoppages or slowdowns) by the Employees or any

lockout by the Employer of any Employee or group of Employees. In view of the foregoing, the Union agrees that it will not authorize any strike * * *.

"* * * The grievance and arbitration provisions as contained in this Agreement shall be the sole recourse and exclusive remedy of the Company and the Union in the event of a breach of this Agreement.

"ARTICLE XI

RENEWAL PROVISO

"This Agreement shall become in full force and effect on this date, March 1, 1956, and shall continue for three (3) years and from year to year thereafter, or until modified, amended, or canceled as herein provided. * * *"

The union removed the case to the United States District Court for the Northern District of Ohio, Western Division, on the ground that federal jurisdiction was created by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, 61 Stat. 156, but the employer's motion to remand was sustained.

The union then filed in the Common Pleas Court a motion for summary judgment, supported by affidavits. The motion was granted, the court citing and quoting at length from *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, 46 LRRM 2414, 34 LA 559, June 20, 1960. Citing also *New Bedford Defense Products Division v. Local 1113, UAW*, 258 F. 2d 522, 42 LRRM 2518, the Common Pleas Court held that the exclusion of wages from arbitration did not necessarily exclude vacation pay, and directed the parties to proceed to arbitration.

On the employer's appeal to the Ohio Court of Appeals the Common Pleas Court was sustained. The Court of Appeals expressly rejected the employer's argument

that vacation pay is wages either as a matter of law or as treated by the union contract. The exact language of the Court's opinion is as follows:

> "The majority of this Court are of the opinion that the action of the trial court should be affirmed; that vacation pay is not wages, either as a matter of law or as treated by the working agreement or the union contract, which is attached to and made part of the petition and that there is no genuine issue as to any material fact, and that therefore, the motion for summary judgment was properly granted." (Appendix B, Petition for Certiorari, p. 16.)

Following the decision by the Ohio Court of Appeals the employer petitioned the Ohio Supreme Court for an order to certify the record to it for review. The petition was denied and subsequent motion for rehearing was likewise denied, September 25, 1963.

III. MANNER OF RAISING FEDERAL QUESTIONS.

The federal question was first raised in the state courts by the union's motion for summary judgment in the Court of Common Pleas. The Common Pleas Court treated the issue as one governed by federal law and decided it favorably to the union, ordering arbitration.

IV. REASONS FOR NOT GRANTING THE WRIT.

This Court's Rule.

Rule 19 of the Rules of this Court states in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion,

indicate the character of reasons which will be considered:

> (a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Neither of these circumstances is present here. The state courts decided a federal question of substance that had already been determined by this Court and decided it in a way clearly in accord with this Court's applicable decisions.

Applicable Principle of Federal Law.

An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, at 582, 4 L. ed. 2d 1409, 80 S. Ct. 1347, 46 LRRM 2416, 34 LA 561, June 20, 1960.

The employer argues that the exclusion from arbitration of wages excludes arbitration of vacation pay. It acknowledges, however, that the contract does not contain a clause *expressly* excluding vacation pay from arbitration. Thus the employer is in the position of saying that the exclusion of wages *impliedly* excludes vacation pay from arbitration. But on this point the union disagrees, pointing out that the contract treats wages and vacation pay separately and that *New Bedford Defense Products Division v. Local 1113, UAW*, 258 F. 2d 522, 42 LRRM 2518 held that vacation pay was not excluded from arbitration by a contract that excluded "matters involving the general wage scale."

The Contract Requires Arbitration.

Such a dispute between the company and the union is expressly committed to arbitration. Article V, Section 1, as quoted above, refers to "any dispute or grievance." Article V, Section 3 says "any dispute or grievance, excepting wages, which cannot be resolved in the foregoing manner, may be submitted to arbitration by either party * * *."

Whatever may be determined eventually as to whether "wages" includes "vacation pay" the dispute as to whether or not it does is not "wages." Thus this dispute as to arbitrability is clearly committed by the contract to decision by an arbiter.

Steelworkers v. American Manufacturing Co., 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343, 46 LRRM 2414, 34 LA 559, June 20, 1960, placed much weight on the fact that the no-strike clause provided for no exception and held that for this reason none should be read into the grievance clause, "since one is the *quid pro quo* for the other."

This is precisely the situation we have here. Article X recites:

> * * * this Agreement provides for the orderly and amicable adjustment and settlement of any and all disputes, differences, disagreements or controversies of any nature or character and there should be no resort to strikes (which include work stoppages or slowdowns) by the Employees or any lockout by the Employer of any Employee or group of Employees. In view of the foregoing, the Union agrees that it will not authorize any strike * * *

And to reenforce the point Article X concludes:

> The grievance and arbitration provisions as contained in this Agreement shall be the sole recourse and

exclusive remedy of the Company and the Union in the event of a breach of this Agreement."

Brampton Woolen Case Distinguished.

The employer places heavy reliance upon *Brampton Woolen Company v. Local Union 112, et al.*, 95 N. H. 255, 61 Atl. 2d 796, 11 LA 487, 1948. In this case the court refused to enjoin the union from proceeding with arbitration of a claim to vacation pay under a contract that expressly provided that wages were arbitrable. It is difficult to know precisely what the holding of the court means in our situation because the opinion does not quote the exact language of the agreement. However, it is plain that the decision came before the development of federal law on this subject in the *Steelworkers'* cases cited above. Moreover, the New Hampshire court held that it was fundamental in its jurisdiction that the interpretation of a written contract is for the court. The present federal law governing our case is that where the parties are as broadly committed to arbitration as they are here the interpretation of the agreement is for the arbiter, unless there is "the most forceful evidence of a purpose to exclude the claim from arbitration." *Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U. S. at page 585.

CONCLUSION.

The state courts in our case have decided a federal question in accordance with federal law as laid down by this Court. They have decided that the subject of vacation pay is not excluded from arbitration by the exclusion of wages, either as a matter of law or as treated by the union contract, and that the dispute between the parties as to whether vacation pay is arbitrable must therefore be decided by arbitration.

The petition for certiorari should be denied.

Respectfully submitted,

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January 16, 1964.